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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

PUBLIC COPY

U.S. Citizenship and Immigration Services

B5

[redacted]

FILE: [redacted] Office: TEXAS SERVICE CENTER Date: JAN 31 2011

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching your decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a software development firm. It seeks to employ the beneficiary permanently in the United States as a programmer analyst pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). In pertinent part, section 203(b)(2) of the Act provides immigrant classification to aliens of exceptional ability and members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. As required by statute, a Form ETA 750 Application for Alien Employment Certification approved by the Department of Labor (DOL), accompanied the petition. The director determined that the petitioner had not submitted the original labor certification requiring an advanced degree as required and the job offered on the labor certification did not require a member of the professions holding an advanced degree or an alien of exceptional ability as indicated on the Form I-140, Immigrant Petition for Alien Worker.

On appeal, counsel asserts that the beneficiary has an advanced degree and offers arguments relevant to the petitioner's ability to pay the proffered wage.

For the reasons discussed below, we find that the director's conclusion is supported by the plain language of the regulation at 8 C.F.R. § 204.5(k)(4), which is binding on us.

The AAO conducts appellate review on a *de novo* basis. The AAO's *de novo* authority is well recognized by the federal courts. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).[1]

Section 203(b) of the Act states in pertinent part that:

> (2) Aliens who are members of the professions holding advanced degrees or aliens of exceptional ability. --
>
> > (A) In general. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.

The regulation at 8 C.F.R. § 204.5(k)(4) provides the following:

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[1]The procedural history of this case is documented in the record and is incorporated herein. Further references to the procedural history will only be made as necessary.

> (i) *General.* Every petition under this classification must be accompanied by an individual labor certification from the Department of Labor, by an application for Schedule A designation (if applicable), or by documentation to establish that the alien qualifies for one of the shortage occupations in the Department of Labor's Labor Market Information Pilot Program. To apply for Schedule A designation or to establish that the alien's occupation is within the Labor Market Information Program, a fully executed uncertified Form ETA-750 in duplicate must accompany the petition. **The job offer portion of the individual labor certification**, Schedule A application, or Pilot Program application **must demonstrate that the job requires a professional holding an advanced degree or the equivalent or an alien of exceptional ability.**[2]

The key to determining the job qualifications is found on Form ETA-750 Part A. This section of the application for alien labor certification, "Offer of Employment," describes the terms and conditions of the job offered. It is important that the ETA-750 be read as a whole. The instructions for the Form ETA 750A, item 14, provide:

> ***Minimum Education, Training, and Experience Required to Perform the Job Duties.*** Do not duplicate the time requirements. For example, time required in training should not also be listed in education or experience. Indicate whether months or years are required. Do not include restrictive requirements which are not actual business necessities for performance on the job and which would limit consideration of otherwise qualified U.S. workers.

Regarding the minimum level of education and experience required for the proffered position in this matter, Part A of the labor certification reflects the following requirements:

Block 14:

Education:	College:	X
	College Degree Required:	BS
	Major Field of Study:	Comp Sci or related
Experience:	Job Offered:	1[yr.]
	Related Occupation:	[none stated]
Block 15:	Other Special Requirements:	None.

[2]There is no indication in this case that the petitioner is requesting a visa based on the beneficiary as an alien of exceptional ability.

In this matter, Block 14 and 15 of the labor certification reflects that a Bachelor of Science in Computer Science or related field of study and one year of experience as a programmer analyst are the minimum levels of education and experience required.

U.S. Citizenship and Immigration Services (USCIS) may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). *See also, Madany*, 696 F.2d at 1008; *K.R.K. Irvine, Inc.*, 699 F.2d at 1006; *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981). USCIS must examine "the language of the labor certification job requirements" in order to determine what the job requires. *See generally Madany*, 696 F.2d at 1015. The only rational manner by which USCIS can be expected to interpret the meaning of terms used to describe the requirements of a job in a labor certification is to "examine the certified job offer *exactly* as it is completed by the prospective employer." *Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984)(emphasis added). USCIS's interpretation of the job's requirements, as stated on the labor certification must involve "reading and applying *the plain language* of the [labor certification application form]." *Id.* at 834 (emphasis added). USCIS cannot and should not reasonably be expected to look beyond the plain language of the labor certification that DOL has formally issued or otherwise attempt to divine the employer's intentions through some sort of reverse engineering of the labor certification.

It is noted that the director issued a notice of intent to deny advising the petitioner that it must submit an original labor certification which has been approved /stamped by the Department of Labor for classification of the beneficiary as a member of the professions holding an advanced degree or an alien of exceptional ability (E21). The petitioner was permitted thirty-three (33) days to respond. The director also advised the petitioner that it had submitted a copy of a labor certification which had been filed for classification under 8 C.F.R. 203(b)(2)(A)(ii) for classification of the beneficiary as a professional (E32), a different visa category than was requested on the Form I-140 under paragraph (d). The director subsequently denied the petition on November 3, 2009, noting that the petitioner had failed to respond to the notice of intent to deny.

A previously filed Form I-140 seeking to classify the beneficiary as a professional had been denied on October 29, 2008. The record shows that no appeal was taken from this decision. The director's decision in that case was based on the petitioner's failure to demonstrate its continuing ability to pay the proffered wage pursuant to 8 C.F.R. 204.5(g)(2) and the petitioner's failure to demonstrate that the beneficiary possessed one year of work experience in the job offered as a programmer analyst as of the priority date.

On appeal in the present matter, with respect to whether the labor certification reflects a requirement for an advanced degree professional, counsel merely asserts that the beneficiary actually possesses such credentials and submits documentation purporting to establish that she holds an advanced degree or a foreign equivalent advanced degree. We find this determination premature as the petitioner fails to demonstrate that the labor certification requires a member of the professions holding an advanced degree.

The regulation at 8 C.F.R. § 204.5(k)(2) defines an advanced degree as follows:

> [A]ny United States academic or professional degree or a foreign equivalent degree above that of baccalaureate. A United States baccalaureate degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate degree or a foreign equivalent degree.

Thus, where experience is not a consideration, the minimum education is a U.S. degree above that of a baccalaureate or the foreign equivalent degree. The copy of the labor certification submitted in this case required only a bachelor's degree and one year of work experience, rather than a master's degree or a bachelor's degree followed by at least five years of progressive experience. Thus, the position does not require a member of the professions holding an advanced degree. The petitioner has failed to submit an original labor certification,[3] which requires a member of the professions holding an advanced degree. The labor certification submitted would only support a filing for a professional worker, as the petitioner previously filed.

Beyond the decision of the director in this case, even if the labor certification properly required an advanced degree professional, we note that the petitioner has not established its continuing financial ability to pay the proffered wage as of the priority date of August 28, 2000. The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence.[4] The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977); *see also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, USCIS requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the overall circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

The petitioner must show that the beneficiary has all the education, training, and experience specified on the labor certification as of the petition's priority date. The petitioner must also establish

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[3]The regulation at 8 C.F.R. § 103.2(4) requires labor certifications to be submitted in the original unless previously filed with USCIS. The petitioner has never submitted an original approved labor certification requiring a member of the professions holding an advanced degree.

[4] If the petition is approved, the priority date is also used in conjunction with the Visa Bulletin issued by the Department of State to determine when a beneficiary can apply for adjustment of status or for an immigrant visa abroad. Thus, the importance of reviewing the *bona fides* of a job opportunity as of the priority date, including a prospective U.S. employer's ability to pay the proffered wage is clear.

that it has the continuing ability to pay the proffered wage beginning on the priority date, the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 CFR § 204.5(d); Matter *of Wing's Tea House,* 16 I&N Dec. 158 (Act. Reg. Comm. 1971). Here, the Form ETA 750 was accepted for processing on August 28, 2000, which establishes the priority date. The proffered wage is stated as $71,000 per year. The Form ETA 750, signed by the beneficiary on August 20, 2000, indicates that she had worked for the petitioner since June 2000.

Part 5 of the I-140, Immigrant Petition for Alien Worker, filed on April 27, 2009, indicates that the petitioner was established on June 26, 1998, claims a gross annual income of $286,731 and a net annual income of $145,939. It claims to employ ten workers.[5]

We briefly note as set forth in the earlier filed case, that the petitioner had employed and paid the beneficiary wages of $28,000 in 2000 and $30,000 per year in the 2001, 2002, 2003, 2004, 2005, and 2006. Thus, the difference between actual wages paid and the proffered wage in 2000 was $43,000. The difference between actual wages paid of $30,000 and the proffered wage of $71,000 was $41,000 in the remaining years of 2001 through 2006. The petitioner's net income as reflected on line 28 of page 1 of its Form 1120, U.S. Corporation Income Tax Returns[6] showed that it reported $3,379 in 2000; $3,464 in 2001; $2,294 in 2002; $3,149 in 2003; $4,184 in 2004; $3,502 in 2005; and $8,923 in 2006. Net current assets[7] were shown on Schedule L of the returns (the total of line(s) 1 through 6 minus the total of line(s) 16 through 18)[8] as $6,324 in 2000; $9,382 in 2001; $22,819 in 2002; $24,405 in 2003; $24,634 in 2004; $28,746 in 2005; and $33,688 in 2006.

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[5]The earlier Form I-140, which was filed on November 16, 2007 and denied on October 29, 2008 using the same labor certification, claimed that the petitioner employed three workers, claimed a gross annual income of $216,160 and an annual net income of $8,923.

[6] The petitioner is a C corporation. For the purpose of this review of the petitioner's Form 1120 corporate tax returns, the petitioner's net income is found on line 28 (taxable income before net operating loss deduction and special deductions). U.S. Citizenship and Immigration Services (USCIS) uses a corporate petitioner's taxable income before the net operating loss deduction as a basis to evaluate its ability to pay the proffered wage in the year of filing the tax return because it represents the net total after consideration of both the petitioner's total income (including gross profit and gross receipts or sales), as well as the expenses and other deductions taken on line(s) 12 through 27 of page 1 of the corporate tax return. Because corporate petitioners may claim a loss in a year other than the year in which it was incurred as a net operating loss, USCIS examines a petitioner's taxable income before the net operating loss deduction in order to determine whether the petitioner had sufficient taxable income in the year of filing the tax return to pay the proffered wage.

[7] According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

[8] A petitioner's total assets and total liabilities are not considered in this calculation because they

In this case, which was decided solely on the petitioner's failure to submit an original labor certification requiring a member of the professions holding an advanced degree, the petitioner has nevertheless submitted copies of bank statements from June 2007 to May 2008 on appeal. Counsel asserts that the petitioner has demonstrated its continuing financial ability to pay the proffered wage.

It is noted that none of these bank statements relate to the 2000 through 2006 period of time, wherein the petitioner failed to establish the continuing ability to pay the proffered wage in the previous filing. Further, the petitioner has not submitted a 2007 or 2008 federal tax return, audited financial statement or annual report required by the regulation at 8 C.F.R. § 204.5(g)(2) to establish a continuing financial ability to pay the proffered wage. Bank statements, standing alone, are not an acceptable substitute and are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise provides an inaccurate financial portrait of the petitioner. Bank statements generally show only a portion of a petitioner's financial status and do not reflect other current liabilities and encumbrances that may affect a petitioner's ability to pay the proffered wage as set forth on an audited financial statement or Schedule L of a corporate tax return. Cash assets should also be shown on the corresponding federal tax return as part of the listing of current assets on Schedule L if the petitioner had submitted its 2007 and 2008 returns. As such, they would already be balanced against current liabilities and included in the calculation of a petitioner's net current assets for a given period. Here, it is noted that no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements, which correlate to the periods that would be covered by the tax returns would somehow show additional available funds that would not be reflected on the corresponding tax return such as Cash, shown on Schedule L, line 1.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009); *Taco Especial v. Napolitano*, 696 F. Supp. 2d. 873, (E.D. Mich. 2010). Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (*citing Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Showing that the petitioner's gross sales and profits exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

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include assets and liabilities that, (in most cases) have a life of more than one year and would also include assets that would not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage.

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now USCIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. *See Taco Especial v. Napolitano*, 696 F. Supp. 2d. at 881 (gross profits overstate an employer's ability to pay because it ignores other necessary expenses).

With respect to depreciation as claimed by counsel, the court in *River Street Donuts* noted:

> The AAO recognized that a depreciation deduction is a systematic allocation of the cost of a tangible long-term asset and does not represent a specific cash expenditure during the year claimed. Furthermore, the AAO indicated that the allocation of the depreciation of a long-term asset could be spread out over the years or concentrated into a few depending on the petitioner's choice of accounting and depreciation methods. Nonetheless, the AAO explained that depreciation represents an actual cost of doing business, which could represent either the diminution in value of buildings and equipment or the accumulation of funds necessary to replace perishable equipment and buildings. Accordingly, the AAO stressed that even though amounts deducted for depreciation do not represent current use of cash, neither does it represent amounts available to pay wages.
>
> We find that the AAO has a rational explanation for its policy of not adding depreciation back to net income. Namely, that the amount spent on a long term tangible asset is a "real" expense.

River Street Donuts at 116. "[USCIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support." *Chi-Feng Chang* at 537 (emphasis added).

In 2000, neither the petitioner's net income nor its net current assets could cover the $43,000 shortfall between actual wages paid to the beneficiary and the proffered wage of $71,000. Similarly, in the remainder of the years from 2001 through 2006, neither the petitioner's net income nor its net current assets could cover the shortfall of $41,000 existing after comparing the actual wages paid to the beneficiary and the proffered salary in each of the 2001 through 2006 years. The petitioner failed to establish its *continuing* ability to pay the proffered wage of $71,000 per year to the beneficiary as of the priority date pursuant to 8 C.F.R. § 204.5(g)(2). Further, for the reasons stated above relevant to its bank statements and lack of other evidence such as federal income tax returns or audited financial statements, we do not find that the petitioner has demonstrated its ability to pay the proffered wage of $71,000 in 2007 or 2008.

It is noted that *Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967) is sometimes applicable where other factors such as the expectations of increasing business and profits overcome evidence of small profits. That case, however relates to petitions filed during uncharacteristically unprofitable or difficult years within a framework of profitable or successful years. During the year in which the petition was filed, the *Sonegawa* petitioner changed business locations, and paid rent on both the old and new locations for five months. There were large moving costs and a period of time when business could not be conducted. The Regional Commissioner determined that the prospects for a resumption of successful operations were well established. He noted that the petitioner was a well-known fashion designer who had been featured in *Time* and *Look*. Her clients included movie actresses, society matrons and [redacted] The petitioner had lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere.

As noted above, none of the federal tax returns evidenced that either the petitioner's net income or net current assets represented sufficient funds to cover the difference between actual wages paid to the beneficiary and the proffered wage of $71,000 per year. It may not be concluded that the federal tax returns herein submitted represent the kind of framework of profitability such as that discussed in Sonegawa, or that the petitioner has demonstrated that such unusual and unique business or reputational circumstances exist in this case, which are analogous to the facts set forth in that case. As no unusual circumstances have been shown to exist in this case to parallel those in Sonegawa, nor has it been established that 2000, the year of filing, was an uncharacteristically unprofitable year for the petitioner, the petition may not be approved on these grounds.

Additionally, as noted by the director in his decision denying the earlier filed petition based on the same labor certification, the petitioner failed to establish that the beneficiary had one year of experience in the job offered as a programmer analyst as listed on the labor certification submitted. That job's duties are described in the ETA 750 as creating, designing implementing and developing software for banking and brokerage systems, using HTML and Java Script. In support of this experience, the petitioner submitted a letter dated April 6, 2000, from the [redacted] The human resources manager signed the letter. She affirmed that the beneficiary had worked for that entity from October 20, 1992 to October 11, 1998. This person stated that the beneficiary performed several jobs including account representative, foreign exchange and banking securities executive, system analyst [redacted] and international trades financial representative. As referenced by the director, however, none of these statements confirms that the beneficiary possessed one year of full-time experience as a programmer analyst. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). No additional information or documentation was submitted with this petition to overcome this deficiency.

As initially discussed, the labor certification provided does not support the approval of the petition for an advanced professional visa classification sought by the petitioner. Additionally, as the record currently stands, it may not be concluded that the petitioner has established its continuing ability to pay the proffered wage or has established that the beneficiary obtained the required one year of work experience as a programmer analyst.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 299 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143 at 145 (AAO's *de novo* authority well recognized by federal courts).

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.